

1959

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### Recommended Citation

Theodore M. Kranitz, *Grand Jury: Past-Present-No Future, The*, 24 Mo. L. REV. (1959)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol24/iss3/2>

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## THE GRAND JURY: PAST-PRESENT-NO FUTURE

THEODORE M. KRANITZ\*

"Grand jury in session." No more fearsome words can echo through the circuit courthouses of this state. When the chains of this common law relic rattle, few there are who do not stir uneasily in the vicinity, behind bland exteriors. Feasance to law and duty is small comfort, for in this day of sometimes irresponsible rapid public communication, suspicion, ignorant criticism, even political ill-will can be as destructive as outright accusation, and accusation is equal to public, if not judicial, conviction. It is not amiss, therefore, to inquire into some of the antecedents of the creature, and to know what to advise a client who will perhaps testify when there is a "grand jury in session."<sup>1</sup>

### I

We form a quick mental image when a grand jury sits. We visualize twelve men seated more or less around a conference table in a closed room near the circuit court, attended on the inside by the prosecuting attorney and on the outside by a deputy sheriff. We know our federal constitution requires that no man be tried for crime except upon presentment of a grand jury.<sup>2</sup> But it was not always so.

The grand jury dates from the time of Henry II (1154-89), who caused panels of twelve men, appointed by the sheriff, to be charged with the duty of accusing any persons in the locality suspected of crime.<sup>3</sup> But this bare statement is an oversimplification. The Supreme Court once delved into the historical form, in *Hurtado v. California*,<sup>4</sup> and came up with this statement:

We learn of its constitution and functions from the Assize of

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1. Judicial procedure relating to grand jury presentments, the preservation of the secrecy of the body, and such other post-indictment matters are outside the scope of this Article.

2. U.S. CONST. amend. V. This, by the way, is the sole function of a federal grand jury: the investigation of crime and the consequent finding of indictments.

3. WORMSER, *THE LAW* 251 (1949).

4. 110 U.S. 516, 529-30 (1884).

Clarendon, A.D. 1164,<sup>[5]</sup> and that of Northampton, A.D. 1176, Stubbs' Charters, 143-150. By the latter of these, which was a republication of the former, it was provided, that "if any one is accused before the justices of our Lord the King of murder, or theft, or robbery, or of harboring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot. And at Northampton it was added, for greater strickness of justice . . . , that he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord, the King." "The system thus established . . .<sup>[6]</sup> is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and hand. If it succeeds, he is nevertheless, to be banished. Accusation, therefore, was equivalent to banishment, at least."<sup>7</sup> (Emphasis added.)

You perhaps wonder about the ordeal by water. This marvelous piece of trial ingenuity worked like this: The person who underwent the ordeal appealed to God to prove his innocence by protecting him from harm; at least, he customarily did, though such appeal was by no means obligatory. The trick was then to plunge one's arm to the elbow in boiling water.<sup>8</sup> Small wonder there were few acquittals; even so, the hand was lost in any event.

Henry II was the 26th king of England and first of the House of Anjou. His *Legis Henrici* is the foundation for much of our common

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5. The Supreme Court may have had its date wrong. Some histories date the Assize of Clarendon at 1166. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 642 (2d ed. 1923); MONTGOMERY, LEADING FACTS OF ENGLISH HISTORY XXXIV (1901).

6. 1 STEPHENS, HISTORY OF CRIMINAL LAW OF ENGLAND 252 (1883).

7. Substitute "trial" for "ordeal," and loss of liberty for the older more brutal forms of punishments, and it is clear that time has not changed the results very much.

8. MONTGOMERY, op. cit. *supra* note 5, at 50-51.

law. Henry sired three sons: The eldest, the romantic idol at some time of every boy, was Richard I, *Coeur de Lion*, who came to the throne in 1189, and reigned a decade. The second son was Gregory, who did not survive, and Gregory's son, Arthur, was murdered, it is said, by Henry's youngest son, John (although no grand jury was ever called to investigate the matter). John, then, who was reluctantly to take his place in history as the signer of Magna Carta, succeeded to the throne in 1199 and there remained until 1216. His son, Henry III, occupied the throne until 1272.

This bit of history is not amiss. In 1215, the last year of the reign of King John, the ordeal by water was abolished.<sup>9</sup> It was little improvement, however, for by the end of the reign of Henry III, it was still common that the question of guilt or innocence should be submitted to the presenting (now grand) jury, to the jury of another hundred (or township), and to the four vills; these formed a single body which delivered a unanimous verdict.<sup>10</sup>

The reasons that the system met with growing opposition are obvious. Furthermore, jurors as well as defendants became unhappy, because if the jury verdict was not satisfactory to the justices, the jurors themselves were often fined or imprisoned. There thus arose a practice of permitting the accused to challenge his inquisitors, and no grand juror could act as trial juror if the accused objected.<sup>11</sup> By 1352, in the reign of Edward III, a statute was necessary and enacted, establishing the general principle that a man's indictors were not to serve as both grand and trial jurors.<sup>12</sup>

Still later it became the practice for the court to authorize the sheriff of each county to return the names of twenty-four or more persons, from whom the grand jury was chosen; the number gradually settled to twenty-three, a majority of whom must consent in order to frame a valid indictment. Thus it became the custom that however many attended, or actually officiated, at least twelve must concur in presenting an offender.<sup>13</sup>

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9. 2 POLLOCK & MATTLAND, *op. cit. supra* note 5, at 647.

10. *Id.* at 646.

11. *State v. Kavanaugh*, 32 N.M. 404, 258 Pac. 209 (1927).

12. 2 POLLOCK & MATTLAND, *op. cit. supra* note 5, at 649.

13. *State v. Kavanaugh*, *supra* note 11.

The evolution of the modern process of indictment by a grand jury and trial by a petit jury was still far off. The details of this growth lie buried in the archives of the fourteenth century,<sup>14</sup> and we only know today, since historians have not yet completed their tasks, the form into which it emerged in the fifteenth century and was brought into the federal constitution in the Bill of Rights on December 15, 1791.

Thus, as the system finally evolved, in the description of the Supreme Court,

. . . criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded on credible testimony or was dictated by malice or personal ill will [of the prosecuting officials].<sup>15</sup>

What has happened to this latter most important function we shall presently see.

So much for the historical foundations of the grand jury system, and the evolution of that august institution (which, incidentally, was abolished in the country of its birth, in 1933). So much, indeed, for the American federal grand jury. We are most particularly concerned with the system as it operates in Missouri, and with its present-day value.

## II

The Territory of Missouri achieved statehood on August 10, 1821. It had drawn and adopted a constitution on July 19, 1820, which became effective on the date President Monroe proclaimed statehood. Article XIII of the constitution of 1820 provided:

That the general, great and essential principles of liberty and free government may be recognized and established, we declare: . . .

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14. 2 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 649.

15. *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

14. That no person can, for an indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or by leave of court, for oppression or misdemeanor in office.

This provision remained unchanged in our organic law for eighty years,<sup>16</sup> and was the only constitutional reference to a grand jury. Thus an indictment was required to be taken as at common law, and in that sense, an accusation was required to be by twelve men of the same county where the offense was committed,<sup>17</sup> and the grand jury could not indict persons for the committing of misdemeanors (*i.e.*, non-indictable offenses at common law) other than in public office.<sup>18</sup> The first of these requirements still obtains.

On November 16, 1900, by amendment to the state bill of rights, the constitution of 1875 was changed, effective November 30 of that year. Article II, section 12 of the organic law was amended to read:

12. No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger.

In addition, a new section was inserted in article II, which provided in part:

28. . . . Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or true bill: *Provided, however,* that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime.

Now the grand jury had the constitutional power to concern itself with misdemeanors as well as felonies, although the power appears to have been legislatively assigned as early as 1845.<sup>19</sup> These provisions

16. Mo. CONST. art. I, § 14 (1865); Mo. CONST. art. II, § 12 (1875).

17. *Ex parte Slater*, 72 Mo. 102 (1880).

18. *State v. Berlin*, 42 Mo. 572 (1868); *State v. Ebert*, 40 Mo. 186 (1867).

19. RSMo 1845, at 314; Mo. Laws 1877, at 279, § 540.240, RSMo 1949.

remain substantially unchanged in the constitution of 1945, except that a grand jury is now composed of twelve *citizens*, not merely *men*: women are eligible since 1945; and it is additionally provided "that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended."<sup>20</sup>

Constitutional provisions generally require the aid of subsequent legislative enactment. The early laws of Missouri were sketchy and wholly inadequate in respect of the powers and organization of grand juries. The first new power came soon, in 1825, when it was made obligatory that each grand jury inspect the county jail,<sup>21</sup> a requirement that remains to this day.<sup>22</sup>

In the same year, the Act of February 14, 1825, was enacted and has never been changed except to eliminate reference to sex, so that it read and still reads:

... every . . . juror [grand and petit] shall be a citizen of this state, and resident within the county, [sober and intelligent, of good reputation,] and above the age of twenty-one years, [and otherwise qualified].<sup>23</sup> (The bracketed material appears in the present statute, and was covered by various sections of the Act of February 14, 1825.)

The first series of major enactments came in 1835, and have remained substantially unchanged these 124 years. This legislation specifically rendered a grand juror incompetent if he was the prosecutor or complainant or a witness for either,<sup>24</sup> and incompetent to serve later on the petit jury trying the indictment brought in by him.<sup>25</sup> Further, it was provided that, when so required, the prosecuting attorney must attend the grand jury to examine witnesses and advise on the law;<sup>26</sup> he may attend on his own request, but may not remain in any event while the grand jurors express their opinions or are voting.<sup>27</sup> For the first time, a unanimous return was not required and the concurrence of only twelve

20. Mo. CONST. art. I, §§ 16, 17 (1945).

21. § 8, at 412, RSMo 1825.

22. § 221.300, RSMo 1949.

23. Terr. Laws 1824, at 238. §§ 2, 6, at 467, RSMo 1825, now § 494.010, RSMo 1949.

24. § 2, at 479, RSMo 1835, now § 540.060, RSMo 1949.

25. § 6, at 490, RSMo 1835, now § 546.110, RSMo 1949.

26. § 6, at 479, RSMo 1835, now § 540.130, RSMo 1949.

27. § 7, at 479, RSMo 1835, now § 540.140, RSMo 1949.

grand jurors was sufficient; an indictment may now be presented upon the concurrence of nine or more grand jurors only.<sup>28</sup>

There were numerous other provisions contained in the act of 1835, of a technical nature outside the scope of this discussion. Only one other matter need concern us: the granting to the grand jury of the power to subpoena witnesses.<sup>29</sup> So broad and unrestricted a power apparently came to be abused, however, to the injury of persons accused. As a result, the legislature, in 1899, restricted the use of the power, so that now no person may be subpoenaed to testify before a grand jury if he is or will be or the foreman believes him to be a witness in the defense of a person whom the grand jury has indicated.<sup>30</sup> Thus, the grand jury may not indict a person and then proceed to reveal his defense to the prosecuting attorney by compelling the witnesses for the accused to come before it and, under the interrogation of the prosecutor, reveal the things to which they will testify on trial. The statute, of course, has the glaring weakness that it can be circumvented simply by holding back the presentment of an indictment until after the defense witnesses have been interrogated.

As a direct corollary to the foregoing rule, it is not within the power of a grand jury to subpoena any person to testify in regard to any matters in which the witness himself is under investigation.<sup>31</sup> This rule is frequently and flagrantly abused. More on this subject later.<sup>32</sup>

The powers and duties of the grand jury were not set out in the act of 1835, except as above noted, and they remained as at common law. But the legislature took cognizance of this omission in 1845 with a statute which, like its predecessors, is substantially the same today. This act provided for the first time that the grand jury must be convened on the order of a judge of a court having jurisdiction to try and determine felonies, with power in the grand jury to investigate, nevertheless, and return indictments for all grades of crimes, misdemeanors as well as felonies.<sup>33</sup> The method of selecting the grand jury was not clear before this time, and the act directs that the order of the judge convening the

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28. § 19, at 481, RSMo 1835, now § 540.250, RSMo 1949.

29. § 8, at 480, RSMo 1835, now § 540.160, RSMo 1949.

30. Mo. Laws 1899, at 172, now § 540.160, RSMo 1949.

31. *State v. Naughton*, 221 Mo. 398, 120 S.W. 53 (1909).

32. See pt. III, *infra*.

33. RSMo 1845, at 314, now § 540.020(1), RSMo 1949. Reenacted in 1877. See also note 19, *supra*.



body may be directed either to the clerk of the jury commission (who is also clerk of the circuit court) or to the sheriff. The exact method as we know it today did not come about until 1931.<sup>34</sup> Under the provisions of the Act of March 27, 1845 the jury is directed to examine public buildings and report on their conditions; inquire into violations of the fish and game laws, the various liquor laws, the election laws, and such other violations as the court may direct; inquire into the failure or refusal of county and municipal officers to perform their duties, and to investigate any violations by county officers of laws relating to the finances or financial administration of the county.<sup>35</sup>

Finally, it was specifically provided, in 1865, that a grand jury shall consist of twelve persons.<sup>36</sup>

### III

There is one more field to consider: the practical considerations which face the lawyer when his client calls and says, "I've been subpoenaed to testify before the county grand jury." He knows he cannot accompany his client into the chambers. What shall he advise?

Of course, every situation is unique. The lawyer must weigh all the considerations and counsel in each case as the circumstances demand. Some factors are constant, however.

In the first place, almost every grand jury will have members whose mental bent is to indict at any opportunity; similarly, there will be those whose inclination is to avoid accusation if at all possible. In between are those who will follow one side or the other, dependent upon suasion. A review of the jury list and an appraisal of its members, particularly the foreman, will help evaluate the initial situation, and to predict the climate into which the witness must step.<sup>37</sup>

A little power makes men heady, and grand jurors are prone to all human frailties. It is with reluctance that a witness should be advised to avail himself of the legal safeguards attendant upon his appearance, for in the prevailing atmosphere mere inquisitiveness—not even suspicion—can

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34. Mo. Laws 1931, at 191, now §§ 495.010, .020, RSMo 1949.

35. RSMo 1845, at 314, now § 540.020(2), RSMo 1949.

36. § 8, at 597, GS 1865, now § 540.010, RSMo 1949.

37. Of course, this thought is of little value in the dense population centers in Jackson and St. Louis counties, and in the City of St. Louis.

be turned often to ungrounded conviction by even the most respectful and proper declination to answer questions. At the same time, a person under investigation cannot be compelled to come before the grand jury and either confess his guilt or commit perjury,<sup>38</sup> and thus there must be truth or silence.

The legal protection afforded a witness is clear. Both the Constitution of the United States<sup>39</sup> and the Missouri constitution of 1945<sup>40</sup> contain the privilege against self-incrimination. No provision more universally appears in the organic law of all American jurisdictions, and none is more uniformly interpreted. Within this protection is the rule that the witness before the grand jury need not even claim his privilege against self-incrimination where it appears that the investigation in which he testifies is directed against him.<sup>41</sup> No person whose alleged crimes are under investigation by a grand jury may be hailed unwillingly before that body and questioned as to such crimes.<sup>42</sup> Of course, if a witness is told, upon inquiry or voluntarily, that his conduct is the subject of investigation, he has the right to refuse to answer any questions whatsoever, and even answers to seemingly non-incriminating questions will not constitute a waiver of the privilege and will vitiate any subsequent indictment.<sup>43</sup>

The oath administered by the foreman of the grand jury takes the usual form of oaths to witnesses, with a statutory addition relating to the preservation of secrecy.<sup>44</sup> To this form prescribed by statute, a new twist has been devised to put the witness (if he is aware of it at all) on the horns of a dilemma. The oath is administered with the additional words,<sup>45</sup> "and that you do not have to answer any question which may tend to incriminate you. So help you, God."

The average nervous and uninformed witness will unhesitatingly take oath as changed. In this fortunate case (for the prosecution), it is

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38. *State v. Caperton*, 276 Mo. 314, 207 S.W. 795 (1918).

39. U.S. CONST. amend. V.

40. Mo. CONST. art. I, § 19.

41. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *State v. Naughton*, 221 Mo. 398, 120 S.W. 53 (1909); *United States v. Edgerton*, 80 Fed. 374 (D.C. Mont. 1897).

42. *State v. Caperton*, *supra* note 38.

43. *State v. Naughton*, *supra* note 41. This is the leading case in Missouri on the subject.

44. § 540.110, RSMo 1949.

45. Approximately.

perhaps taken—and is certainly intended to be taken—as a warning that the witness is the party under investigation and further as an appraisal to him of his rights. The hidden ball trick may have worked,<sup>46</sup> although it is clear that no forthright warning has been given.

But suppose the witness has been warned by counsel beforehand, or he is perceptive enough to catch this extra-statutory clause. Now the dilemma is clear. If he refuses the oath in that form he may be held contumacious or contemptuous; his position in any event before the grand jury will not be improved. The possibilities inherent in accepting the oath have already been pointed out. Until an appellate court rules the question, it would seem that the only safe course is respectfully to decline to take the oath but to offer to take it in pure statutory form. Let the foreman or the prosecutor then be compelled, if he is willing, to advise the witness forthrightly that he is under investigation and that he may decline to answer any questions whatsoever, incriminating or otherwise, in line with the rule in the *Naughton* case.<sup>47</sup>

#### IV

In evaluating the residual benefits of grand jury proceedings, we must start with recognition of one central fact: proceeding by information or by grand jury indictment are concurrent remedies.<sup>48</sup> The old theory that the grand jury “stands between the prosecutor and the accused,” for the purpose of ascertaining “whether the charge was founded on credible testimony or was dictated by malice or personal ill will”<sup>49</sup> is long since without value. The grand jury does not stand between the prosecutor and the accused because the prosecutor can proceed by information in any event. Furthermore, since an information charging a felony must be heard preliminarily before a magistrate trained in the law, the magistrate rather than the grand jury more truly stands between; there is no preliminary hearing on an indictment.

When certain types of public oppressions are to be unearthed, where public officials, particularly in the judicial and enforcement branches, are misusing their offices, where the nature of the suspected crime almost (it

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46. I say “may” because this new device has not yet been subjected to judicial scrutiny.

47. *State v. Naughton*, *supra* notes 41, 43.

48. Mo. Constr. art. II, § 12 (1875); Mo. Constr. art. I, § 17 (1945).

49. *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

never entirely or really) calls for the ringing of the tocsin to bring out the self-righteous vigilantes, then the value of secret grand jury proceedings is apparent, for the grand jury is peculiarly beyond the control of such officials when public management is under investigation. Again, the grand jury's in effect supervisory function over public institutions and those new and special (as distinguished from historical and inquisitorial) powers mentioned in the act of 1825 and the second part of the act of 1845, are of lasting benefit. As an inquisitorial body generally, for the presenting of accusations of crimes, the grand jury is a relic which should take its place upon the dusty shelves of legal history, beside other ancient common law practices. Its office is more than filled by the modern alternative procedure of proceeding by information.

This conclusion is not original. Learned essays and competent surveys indicate and have indicated for over thirty-five years that the efficacy of the grand jury is long since dessicated. Bettman and Burns, in their survey on *Criminal Justice in Cleveland*, write that "generally the grand jury does little more than rubber-stamp the opinion of the prosecutor. It is almost exclusively dependent upon him for its knowledge of the law, and for its information on the facts it is almost entirely dependent on his zeal and willingness."<sup>50</sup> What the grand jury brings forth rests, not on what the law is, but on what the prosecuting attorney says it is; not on what the facts are, but on what construction—or implication—the prosecuting attorney gives the facts by the evidence (if any) which he presents or withholds. Today, the grand jury may well be, in given circumstances, the skirt behind which an over-zealous or malicious or even corrupt prosecutor may hide to destroy the accused in the white-hot light of public accusation, without merit, and without fear of retribution in the form of a suit for malicious prosecution.

The National Committee on Law Obervance and Enforcement conducted a nationwide survey in 1931. Its findings covered the entire United States. The committee said:

Every prosecutor knows, and every intelligent person who has ever served on a grand jury knows, the prosecuting officer almost invariably dominates the grand jury. . . . The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of

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50. BETTMAN & BURNS, *CRIMINAL JUSTICE IN CLEVELAND* 211-12 (1922).

propriety and justice. . . . If the State's attorney wished to prosecute [the innocent citizen], he could easily obtain an indictment from a grand jury which he dominates.<sup>51</sup>

This is no small matter. As was pointed out early in this Article, an accusation is as socially and economically damning as a conviction, and James Thurber's tongue was not entirely in cheek when he wrote in one of his fables, "Guilt by exoneration! What a lovely way to end his usefulness!"<sup>52</sup>

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51. NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 124-26 (1931), citing Illinois survey at 299, 218.

52. THURBER, FURTHER FABLES OF OUR TIMES 102 (1956).